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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP, AND DR. MAXIMILIAN GOLDSTEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

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No. 939

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ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. Of the questions raised by the petition for writ of certiorari and supporting brief, the only one which may be of sufficient general importance to warrant review by this Court is that relating to the admissibility in evidence, under Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605) of some 76 intrastate telephone communications [1] which had been intercepted under the super-

[1] See discussion, page 7, *infra*, with reference to one of these communications. Petitioners also refer to three other intercepted intrastate communications but admit that the

vision of Government officers by means of tapped telephone wires. (R. 560, 563, 586–588.) The Circuit Court of Appeals was of the opinion that if the intercepted messages were improperly admitted, each of the petitioners was prejudiced, and the Government does not dispute that this is so if all of them were inadmissible.

The Circuit Court of Appeals held that the admission of these telephone communications was not prohibited by Section 605 of the Federal Communications Act;[2] that this statute applies only to interstate and foreign communications and not to intrastate communications; and that the decision of this Court in *Nardone* v. *United States,* 302 U. S. 379, dealt only with the admissibility in evidence of interstate communications. The court recognized that its holding was in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Sablowsky* v. *United States,* 101 F. (2d) 183, and the Circuit Court of Appeals for the Sixth Circuit in *Diamond* v. *United States* 94 F. (2d) 1012.[3]

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contents of those were not introduced in evidence. They were used merely for the purpose of refreshing the recollection of the petitioner Weiss on cross-examination and no objection was made to their utilization for that purpose (R. 1908–1925, 1965–1969, 2000–2003).

[2] The pertinent portion of Section 605 reads as follows: "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person".

[3] The conflict does not clearly appear from this opinion, but see the unreported opinion of April 16, 1938, denying a petition for rehearing by the Government, quoted at pages 28–30 of the petition for writ of certiorari herein.

See also *United States* v. *Plisco*, 22 F. Supp. 242 (U. S. D. C. Dist. of Col.). The court chose, however, to follow the decision of the Circuit Court of Appeals for the First Circuit in *Valli* v. *United States*, 94 F. (2d) 687.[4] To the same effect is an unreported decision of the District Court for the Eastern District of Missouri in *United States* v. *Bianco*, decided January 13, 1938.

In view of this conflict of decisions on the question of the admissibility in evidence of intercepted intrastate communications under Section 605 of the Communications Act,[5] this case would clearly be an appropriate one for review by this Court, except for a significant distinction between the instant case and the other pertinent decisions which was presented by the Government in its argument in the court below but which that court found it unnecessary to discuss in view of its hold-

[4] In this case this Court on March 28, 1938, granted a petition for writ of certiorari (303 U. S. 632), but on May 31, 1938, the writ was dismissed on motion of counsel for the petitioners (No. 814, October Term 1937).

[5] Even if the provisions of Section 605 in question be deemed applicable to intrastate communications, there may arise the question whether Congress had the constitutional authority to make them so applicable. In the unreported decision in the *Bianco* case, *supra*, it was said that: "It is our opinion that the second clause of Section 605 * * * relates only to interstate communications, and had Congress attempted to make such clause applicable to intrastate communications it would have been invalid." Cf., however, the unreported opinion denying the petition for rehearing in the *Diamond* case, *supra*.

ing that, the communications being intrastate, their admission in evidence was not forbidden by Section 605. In the prior cases involving the question, the contents of intercepted communications had been testified to by the Government agents who had intercepted them. In the instant case, however, none of the communications was divulged in court by the persons who intercepted them. The record discloses that both of the parties to 38 of the intercepted communications testified for the Government.[1] One of the two parties to 37 of the communications likewise testified.[2] Each of these

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[1] Ex. 110, R. 227–229, 284, 2833–2834; Ex. 118, R. 280–282; Ex. 119, R. 280–282, 745–747, 2840–2849; Ex. 121, R. 299, 749; 2852–2853; Ex. 122, R. 287–288, 2854–2855; Ex. 123, R. 288–290, 755, 2856–2857; Ex. 124, R. 290, 759, 2858–2860; Ex. 125, R. 291, 762, 2861–2863; Ex. 126, R. 292–293, 768, 2864–2866; Ex. 127, R. 293–294, 768, 2867; Ex. 128, R. 294–297, 2868; Ex. 133, R. 299, 791, 2871; Ex. 147, R. 315, 815, 2888; Ex. 149, R. 318, 815, 2890; Ex. 153, R. 324, 821, 2897; Ex. 162, R. 331, 832, 2904–2907; Ex. 169, R. 341, 843, 2915–2916; Ex. 202, R. 760, 2990–2991; Ex. 203, R. 764–765, 1467–1468, 2992–2994; Ex. 208, R. 772, 1469–1470, 3001–3002; Ex. 209, R. 776, 1471, 3003–3004; Ex. 211, R. 779, 3006–3007; Ex. 213, R. 784–785, 1482, 3009–3010; Ex. 217, R. 790, 3015; Ex. 219, R. 792, 1163–1164, 3017–3019; Ex. 222, R. 797, 1485, 3021; Ex. 229, R. 808–809, 1179, 3033; Ex. 232, R. 819, 1490, 3036; Ex. 236, R. 827, 1196, 3039–3041; Ex. 237, R. 828, 3042; Ex. 240, R. 831, 3047–3049; Ex. 276, R. 1175–1176, 3069–3070; Ex. 278, R. 1182, 3072; Ex. 279, R. 1183, 3073–3074; Ex. 285, R. 1189–1190, 3076–3077; Ex. 351, R. 1487–1488, 3153; Ex. 353, R. 1493, 3155; Ex. 354, R. 1493, 3156.

[2] Ex. 120, R. 748, 2850–2851; Ex. 138, R. 305–307, 2874–2875; Ex. 140, R. 309, 2877–2878; Ex. 141, R. 311, 2879; Ex. 142, R. 312, 2880–2883; Ex. 144, R. 313, 2885; Ex. 145, R. 314, 2886; Ex. 146, R. 315, 2887; Ex. 148, R. 318, 2889; Ex.

communications was admitted after it had been identified by at least one of the parties thereto.[8] The parties identifying the communications were defendants who had pleaded guilty to the indictment.[9] There is nothing in the instant record to indicate that the testimony of these witnesses was coerced or induced by promises of leniency. Indeed the record reveals otherwise (R. 112, 596, 1127, 1408, 2577). Section 605 does not forbid the authorized publication of intercepted communications. It provides that "no person *not being authorized by the sender* shall intercept any commu-

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150, R. 320, 2891–2892; Ex. 151, R. 323, 2893–2894; Ex. 152, R. 324, 2895–2896; Ex. 154, R. 324–325, 2898; Ex. 155, R. 325, 2899; Ex. 156, R. 325, 2900–2901; Ex. 163, R. 335–336, 2908; Ex. 164, R. 336, 2909; Ex. 165, R. 338, 2910; Ex. 166, R. 339–340, 2911; Ex. 167, R. 340, 2912–2913; Ex. 168, R. 340, 2914; Ex. 170, R. 341–342, 2917–2918; Ex. 200, R. 750, 2987–2988; Ex. 206, R. 769, 2998–2999; Ex. 212, R. 783–784, 3008; Ex. 214, R. 786, 3011; Ex. 218, R. 791, 3016; Ex. 220, R. 793, 3020; Ex. 228, R. 805–806, 3032; Ex. 230, R. 809, 3034; Ex. 231, R. 810, 3035; Ex. 277, R. 1180, 1268, 3071; Ex. 286, R. 1190–1191, 3078–3079; Ex. 287, R. 1192, 3080–3081; Ex. 288, R. 1193, 3082; Ex. 292, R. 1199, 3086–3087; Ex. 361, R. 1509, 3162.

[8] Each communication was introduced either by reading to the jury a stenographic transcript thereof or by playing upon a phonograph in open court a recording of the communication. Prior to the trial a recording of each of the communications was listened to by the party identifying the communication at the trial. This party would compare the stenographic transcript with the record and would correct the former to conform with the latter. See record references in footnotes 6 and 7, *supra*.

[9] Defendants Messman, Nelson, Berger, and Spitz (R. 34; see also opinion of the court below, p. 2).

nication *and divulge or publish*" the existence, etc. of such intercepted communication to any person. (Italics ours.) It is evident, therefore, that the section permits the divulging of intercepted communications if the "sender" has authorized such divulging. Obviously, the word "sender" was not an apt word to use in connection with telephone conversations. It applies rather to telegraphic and other like communications. The provision in question was taken from Section 27 of the Radio Act of 1927 (Act of February 23, 1927, c. 169, 44 Stat. 1162, 1172). The only change made was the substitution of the word "communication" for the word "message." It is apparent therefore that the word "sender" was used in the Radio Act of 1927 in connection with one-way communications. The present Act applies not only to such communications but also to two-way communications such as telephone conversations, in which two parties are essential to the communication. Both logically and practically the word "sender" as applied to telephone conversations would seem to be without meaning unless it applies to either party to such a communication. That neither party has an exclusive right or property in a telephone conversation is supported by the fact that, irrespective of any question of interception, either party to such a communication could undoubtedly testify as to its substance or purport without the consent of the other. It would therefore seem that the word "sender" as used in Section 605 should be so construed as to permit

the divulging of a telephone conversation where either party thereto has sanctioned such divulging. If this is so, the divulging in court of 75 of the 76 intrastate communications was "authorized" within the meaning of Section 605.

The only intrastate communication [10] the divulging of which may not accurately be said to have been authorized by one of the parties thereto is Exhibit 307 (R. 3102–3103). This communication was between the petitioners Gross and Weiss. It was identified by the defendant Spitz, who, while in Weiss' office, overheard his end of the conversation and testified to what he heard (R. 1333–1335). Subsequently the exhibit was admitted during the cross-examination of the petitioner Gross over his objection (R. 2113–2114). While this communication related to fees to be charged by Weiss and indicated that Gross was a "runner" for Weiss, we submit that this single communication cannot be said to have been prejudicial to either Weiss or Gross since it is apparent from the opinion below that there was ample evidence, other than this communication, to establish the conspiracy and scheme charged and to connect both petitioners therewith (Op. pp. 8–9, 14).

2. The contentions of the petitioners that reversible error resulted from improper cross-

[10] While the petitioners assert that there was no showing that this communication was intrastate rather than interstate, it is apparent from the opinion of the court below and the holding of the District Judge in ruling upon its admissibility that the communication was, in fact, intrastate (Opinion below, p. 6; R. 2113–2114).

examination of several of them and of their character witnesses and from an improper summation by the United States Attorney, do not appear to be of sufficient general interest or importance to justify their review by this Court. The record discloses that whenever the occasion demanded the trial judge either sustained objections or admonished the jury that statements of counsel were not evidence and should be disregarded (R. 1767, 1774, 1902, 1978, 2092, 2122, 2132). He moreover gave a similar instruction in his general charge to the jury (R. 2595). The opinion below discloses that that court also gave consideration to these contentions and that, giving due heed to the decision of this Court in *Berger* v. *United States*, 295 U. S. 78, it concluded that none of the alleged errors warranted reversal.

3. With reference to the refusal of the trial judge to give a requested instruction regarding the statutory fees of Government witnesses, there was clearly no reversible error, since the requested charge obviously had no relevancy and in any event was sufficiently covered by that portion of the general charge respecting the interest of witnesses in the outcome of the case (R. 2594). Concerning the denial of the trial court of the motion of petitioner Gross to suppress certain documents as evidence (R. 57–58), all that need be said is that none of these documents was introduced in evidence. It is therefore apparent that neither of these latter con-

tentions is of sufficient importance to warrant certiorari.

4. We therefore ~~suggest~~ submit that if the disclosure in court of the 75 intrastate communications may be deemed to have been "authorized by the sender" within the meaning of Section 605, a review of the present case will not resolve the conflict of decisions involving the admissibility under that section of intercepted intrastate communications. If, however, certiorari should be granted, we respectfully suggest, in view of the unimportance of the other contentions urged by petitioners, that review be limited to the admissibility of these communications under Section 605, unless this Court desires to reexamine questions urged by the petitioners which were disposed of by it in its decision in *Olmstead* v. *United States*, 277 U. S. 438. If that is so, review should be confined, for the reason stated, to the admissibility of the communications.

Respectfully submitted.

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